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APR 22 2005

No. 04-1183

IN THE

Supreme Court of the United States

PHILIP D. OVERSTREET,

Petitioner,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TERRY SELLARS
HENRY WATZ GARDNER
SELLARS & GARDNER, PLLC
401 West Main Street
Suite 314
Lexington, Kentucky 40507
(859) 253-1320

Attorney for Respondent

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STATEMENT OF THE CASE

A. Overstreet's Companion Case: Overstreet v. LFUCG

The Sixth Circuit issued an unpublished opinion[1] in a companion case Philip Overstreet had filed against his employer, the Lexington-Fayette Urban County Government ("LFUCG"), simultaneously with its opinion in this case [Petitioner's Appendix (Pet. App.) 1a]. Overstreet had sued LFUCG in United States District Court about five months prior to filing his Petition in this action [Pet. App. 33a], challenging the constitutionality of a real property disclosure policy LFUCG had recently adopted. The policy required employees in certain divisions to disclose their own as well as their family's real property holdings in Fayette County, Kentucky. The policy was developed as a tool to enable LFUCG to avoid conflicts of interest between its employees' ownership interests and their roles as government employees. Overstreet sought a declaratory judgment, an injunction and damages in his companion case against LFUCG, and alleged the policy violated his Third, Fourth, Fifth, Ninth and Fourteenth Amendment rights. When Overstreet filed his complaint in the companion case, he also filed a motion asking that LFUCG be temporarily enjoined from enforcing the policy. Overstreet appealed the district court's denial of his motion for injunctive relief and the Sixth Circuit affirmed, holding that he was unlikely to succeed on the merits on privacy and Fourth Amendment claims he asserted on appeal, since he had "no legitimate expectation of privacy in the information sought by his employer, much of which is already a matter of public record." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 577 (6th Cir. 2002).

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[1] *See Overstreet v. Lexington-Fayette Urban County Gov't.*, No. 03-6133, 2004 WL 2452711 (6th Cir. Oct. 28, 2004).

The district court subsequently dismissed Overstreet's privacy and Fourth Amendment claims on the merits and held he had waived his remaining constitutional claims. Overstreet appealed and the Sixth Circuit affirmed the district court, holding that Overstreet had abandoned his privacy and Fourth Amendment claims on appeal, and that although he had not waived other constitutional claims, he had failed to present any evidence, legal authority or valid argument in support of his claims that his substantive due process or equal protection rights were violated or that LFUCG's policy was unconstitutionally vague.[2]

B. Overstreet v. Commission

After filing his companion case against LFUCG on October 29, 2000 challenging the constitutionality of the disclosure policy, Overstreet received a disclosure form with instructions to complete it by November 1, 2000. He returned the form by the requested date, filling out only his name, division, and employee number and attached a notarized statement to the otherwise blank form which stated that the information was a matter of public record and could be obtained from public records if desired.[3] In response, LFUCG gave Overstreet a written reprimand and instructed him to complete the form. Overstreet failed to do so and as a result was disciplined with a suspension without pay for seven days. He then filed an administrative appeal of the discipline with the Respondent, the Lexington-Fayette Urban County Government Civil Service Commission ("Commission"). The Commission affirmed the discipline and Overstreet filed this action [Pet. App. 33a-35a] on March 2, 2001 in state court pursuant to

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[2] *Id.*

[3] Overstreet's allegation on page 3 of his Petition that he was disciplined for his "failure to sign a Property Disclosure Form" is incorrect.

Kentucky Revised Statutes § 67A.270, seeking an on the record review of the Commission's decision. His Petition [Pet. App. 33a] sought attorneys' fees and reversal of the Commission's decision on the grounds that its decision was arbitrary and capricious under Kentucky law.

Paragraph 10 of his Petition [Pet. App. 35a] restated the Fourth Amendment Claims pending in his lawsuit against LFUCG by alleging that the Commission's decision affirming LFUCG's "unconstitutional actions" actions somehow constituted "a further violation" of his Fourth Amendment rights. Paragraph 7 of the Petition [Pet. App. 34a] complained that the Commission's refusal to review the constitutionality of the policy he was disciplined for violating was arbitrary under Kentucky law, but asserted no federal claims against the Commission. The remaining paragraphs in his Petition allege that the Commission's actions were arbitrary under state law.[4] The Commission removed the case on March 28, 2001 to the same federal district court where his Fourth Amendment and other constitutional claims against LFUCG were pending, and the district court assumed supplemental jurisdiction of Overstreet's state law appeal of the Commission's decision.

The district court granted Overstreet's motion for summary judgment in this case and reversed the Commission's decision on the grounds that its decision upholding LFUCG's discipline of Overstreet was arbitrary under Kentucky state law [Pet. App. 12a-13a]. The court additionally found [Pet. App. 13a-14a] that the Commission's "unwillingness or inability" to provide a complete transcript of the Commission hearing to the court

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[4] Those allegations, which LFUCG denied, are recounted in the first three paragraphs of Overstreet's Statement of the Case in his Petition to this Court, but are not addressed in this Response since they are irrelevant to the question of whether the Sixth Circuit correctly decided the district court lacked subject matter jurisdiction.

for review prevented meaningful post-deprivation review, thus violating Overstreet's procedural due process rights, a claim that Overstreet had not plead in his Petition [Pet. App. 33a]. As a result, the district court set aside the Commission's decision and awarded Overstreet a total of $30,573.20 in legal fees pursuant to 42 USC § 1988 (b) as the prevailing party in a civil rights action, despite the court's acknowledgement that Overstreet had failed to plead or argue Section 1983 [Pet. App. 19a]. The Sixth Circuit subsequently vacated the district court's opinion on the grounds that it lacked subject matter jurisdiction of the case, and instructed the district court to remand the case to Kentucky State Court [Pet. App. 1a]. Overstreet now petitions this Court for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First, the Petitioner provides no compelling reason within the meaning of Sup. Ct. R. 10 for granting his Petition. The Sixth Circuit decision does not conflict with any decision of this court or of any Court of Appeals or court of last resort of any state. The Petitioner merely argues that the Sixth Circuit has misapplied properly stated principles of law, which does not constitute a compelling reason justifying discretionary review by this Court.

Second, the Sixth Circuit correctly applied settled principles of law in holding that the Fourth Amendment claim asserted in the Overstreet's state court Petition [Pet. App. 33a] was not sufficiently substantial to confer federal subject matter jurisdiction. It is indicative of the lack of substantiality of Overstreet's Fourth Amendment claim that: 1) the district court did not address its merits in its Opinion & Order in this case [Pet. App. 9a] and summarily dismissed the claim in a companion case discussed above (*see* footnote 1, *supra*); 2) Overstreet abandoned the Fourth Amendment claim on appeal in the companion case (*Id.*), in which the Sixth Circuit issued

an opinion simultaneously with its opinion in this case [Pet. App 1a].

Third, in correctly holding that the district court lacked subject matter jurisdiction, based upon Overstreet's statement of his own claim in his Petition [Pet. App. 33a], the Sixth Circuit properly vacated the district court judgment awarding $30,573.20 in attorneys' fees pursuant to 42 U.S.C. § 1988 (b) as the prevailing party in a civil rights action. The award of attorneys' fees was based upon a procedural due process violation that was not alleged in Overstreet's Petition [Pet. App. 33a] and that could not, therefore, have formed the basis for creating subject matter jurisdiction in federal court.

ARGUMENT

I. Overstreet Has Not Provided a Compelling Reason to Justify Discretionary Review by This Court

Overstreet has provided no compelling reason within the meaning of Sup. Ct. R. 10 for granting his Petition. Overstreet does not argue that the Sixth Circuit decision conflicts with any decision of any Court of Appeals or court of last resort of any state. He does argue that the Sixth Circuit decision conflicts with *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), in which this Court held that a federal district court had jurisdiction of a case that contained both state law claims for on-the-record review of administrative findings and claims that local administrative action violated federal law[5]. Nothing in the Sixth Circuit decision can be construed as

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[5] The complaints in *City of Chicago v. International College of Surgeons*, *supra*, raised a number of substantial federal constitutional claims, including that local ordinances violated the Due Process and Equal Protection Clauses and that they effected a taking of property without just compensation under the Fifth and Fourteenth Amendments.

questioning the district court's ability to assume pendant or supplemental jurisdiction of Overstreet's state law claims, assuming his right to relief under those claims required resolution of a substantial federal question. The Sixth Circuit merely questioned whether the federal question appearing on the face of Overstreet's Petition [Pet. App. 33a] in this case had sufficient substance to confer subject matter jurisdiction on the court. It concluded that it did not, and the court's analysis is in full accord with a long line of this court's cases, including *United Mine Worker v. Gibbs*, 383 U.S. 715, 725 (1966), and *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933), as well as *City of Chicago*, *supra* at 164, on which Overstreet relies, which said:

> As we have explained, however, "[e]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a *substantial* question of federal law." [emphasis added] [quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 13 (1983).

Thus, Overstreet has established no conflict between the Sixth Circuit statement of the law and prior decisions of this Court. He merely argues that the Sixth Circuit has misapplied properly stated principles of law, and he has not, therefore, stated a compelling reason justifying discretionary review by this Court.

II. The Sixth Circuit Correctly Applied This Court's Cases in Holding That the Federal Question Asserted in Overstreet's State Court Petition Was Not Sufficiently Substantial to Confer Federal Subject Matter Jurisdiction

Overstreet's Petition [Pet. App. 33a] stated in its introductory paragraph that it was filed pursuant to Kentucky Revised Statutes §67A.270, a state statute that allows LFUCG employees to seek on the record state court judicial review of adverse Commission disciplinary decisions. The Petition's only direct reference to federal law is its allegation in paragraph 10 [Pet. App. 35a] that the Commission's decision upholding LFUCG's "unconstitutional" actions constituted a "further violation" of Overstreet's rights "under the Fourth Amendment to the United States Constitution." Whether a claim presents a federal question is determined by looking to "the plaintiff's statement of his own claim." *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914), but jurisdiction is not conferred on a federal court "simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit." *Newburyport Water Company v. City of Newburyport,* 193 U.S. 561, 576 (1904).

In his appeal of the district court's denial of temporary injunctive relief in his companion case against LFUCG, the Sixth Circuit held Overstreet was unlikely to prevail on the merits on his Fourth Amendment Claim, since under well settled law he had "no legitimate expectation of privacy in the information sought by his employer, much of which is already a matter of public record." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 577 (6th Cir. 2002). The district court subsequently summarily dismissed Overstreet's privacy and Fourth Amendment claims on the merits, and Overstreet apparently perceived his Fourth

Amendment claim to be so meritless that he abandoned the claim in his second appeal to the Sixth Circuit.[6] The Sixth Circuit properly concluded in this case that there was no justifiable basis for treating this case as sufficiently raising a federal question substantial enough to provide a basis for removal, given that Overstreet's Fourth Amendment claim was adequately addressed in his companion case against LFUCG [Pet. App. 6a].

If Overstreet's Fourth Amendment claim against LFUCG in his companion case was without sufficient merit to withstand LFUCG's motion to dismiss for failure to state a claim on which relief could be granted, his claim in this case that the Commission decision affirming his LFUCG's discipline was a further violation of his Fourth Amendment rights [Pet. App. 35a] lacks all plausibility and is so "plainly insubstantial" and "obviously without merit" that it could not confer federal question jurisdiction on the district court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933). As the Sixth Circuit noted, it is indicative of the lack of substantiality of Overstreet's Fourth Amendment claims that the district court did not address the merits of those claims in any discernible fashion in its opinion, aside from noting in the procedural posture of the case that the claim had been alleged in his Petition [Pet. App. 33a]. The insubstantiality of Overstreet's claim is further underscored by his abandonment of his Fourth Amendment Claims against LFUCG on appeal in his companion case.[7]

Although the district court ultimately held the Commission's failure to produce a complete transcript of the

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[6] *See Overstreet v. Lexington-Fayette Urban County Gov't.*, No. 03-6133, 2004 WL 2452711 (6th Cir. Oct. 28, 2004).

[7] *Id.*

hearing violated Overstreet's procedural due process rights, no such claim was alleged in Overstreet's Petition [Pet. App. 33a] and could not, therefore, form the basis for creating subject matter jurisdiction in federal court. *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914). Nor does Overstreet's Petition [Pet. App. 33a] allege a denial of due process under federal law, as he says it does in his Petition to this Court. He also argues in his Petition to this Court that paragraph 7 of his Petition [Pet. App. 34a] alleges that the policy he was disciplined for violating was unconstitutionally vague and unconstitutional as applied, allegations the Sixth Circuit had rejected as meritless in his appeal on the merits in his companion case against LFUCG.[8] Paragraph 7 of his Petition [Pet. App. 33a], however, makes no direct reference to federal law, and merely states that the Commission's refusal to consider the constitutionality of the policy, an issue then pending in district court in his companion case against LFUCG, was arbitrary and a violation of the state law authorizing creation of the Commission.

The Sixth Circuit correctly applied well settled principles in holding that the federal claim stated in Overstreet's Petition was not sufficiently substantial to support federal question jurisdiction. It correctly held that his Petition [Pet. App. 33a] presented, in substance and in fact, exclusively issues of state law and properly vacated the district court's opinion with instructions to remand the case to state court.

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[8] *Id.*

III. Since the District Court Lacked Federal Question Jurisdiction, the Sixth Circuit Properly Vacated Its Judgment Awarding Overstreet Legal Fees Pursuant to 42 U.S.C. § 1988 (b) as the Prevailing Party in a Civil Rights Action

Given Overstreet's failure to state a substantial federal question in his Petition [Pet. App. 33a], the Sixth Circuit properly vacated the district court judgment awarding him $30,573.20 in attorneys' fees pursuant to 42 U.S.C. § 1988 (b) as the prevailing party in a civil rights action. The district court based its award of attorneys' fees upon a procedural due process violation that Overstreet had not alleged in his Petition [Pet. App. 33a] and that could not, therefore, form the basis for creating subject matter jurisdiction in federal court. *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914).

Overstreet acknowledged on page five of his brief that the district court had held the Commission's actions constituted a "deprivation" of his "due process and Constitutional rights" and awarded him "as the prevailing party, the sum of $30,573.20 in attorney's and costs." He then misrepresented the Sixth Circuit's holding on page 8 of his brief, arguing that it had concluded that the district court lacked jurisdiction to award the attorneys' fees as sanctions. The Sixth Circuit made no such conclusion. Instead, the Sixth Circuit concluded, as Overstreet did in his Statement of the Case, that the district court awarded "Overstreet a total of $30,573.20 in legal fees pursuant to 42 U.S.C. § 1988 (b) as the prevailing party in a civil rights action." [Pet. App. 4a].

The district court held in its Opinion and Order on the parties' motions for summary judgment that the Commission's "unwillingness or inability" to furnish a complete transcript "effectively prevent any meaningful post deprivation court

review, and constitute a violation of procedural due process" [Pet. App. 14a]. The Commission reminded the district court in its Motion to Alter and Amend that Overstreet, not the Commission, had the burden under applicable state law of providing the court a transcript, *see Brady v. Pettit*, Ky., 586 S.W.2d 29, 33 (1979). The district court, in response, implied in its Order overruling the Commission's motion that it could have awarded the $30,573.20 in attorneys' fees as a discovery sanction [Pet. App. 19a]. It did not do so, however, and had it done so the Commission would have appealed the award as an abuse of the court's discretion under all the facts of the case. Instead, the court held on the same page of its opinion that the Commission's actions "effectively prevented the proper application of corrective judicial process" in violation of 42 U.S.C. § 1983 "and as a prevailing party Overstreet is entitled to attorney fees under 42 U.S.C. § 1988 (b) despite failing to plead or argue Section 1983." [emphasis added] [Pet. App. 19a].

The Sixth Circuit correctly applied well settled principles in holding that a procedural due process violation not alleged in Overstreet's Petition [Pet. App. 33a] could not form the basis for creating subject matter jurisdiction in federal court. "It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed." *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 2000) citing *Pullman Co. v. Jenkins,* 305 U.S. 534, 537-38 (1939).

CONCLUSION

For the reasons set forth above, the Respondent, Lexington-Fayette Urban County Government Civil Service Commission, respectfully requests that the Petition for a Writ of Certiorari filed by the Petitioner, Philip D. Overstreet, be denied.

Respectfully Submitted,

TERRY SELLARS
HENRY WATZ GARDNER
SELLARS & GARDNER, PLLC
401 West Main Street
Suite 314
Lexington, Kentucky 40507
(859) 253-1320